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In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Nos. 94-1546 and 94-1646
Miron Construction Co., Inc.,

Plaintiff-Appellant,

v.

International Union of Operating Engineers, Local 139,

Defendant-Appellee,
Cross-Appellee,

and

Wisconsin Laborers District Council,

Defendant-Appellee,
Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 92 C 589 - John W. Reynolds, Judge.

Argued September 20, 1994 - Decided January 6, 1995

Before Eschbach, Ripple and Rovner, Circuit Judges.

Eschbach, Circuit Judge. Miron Construction Company ("Miron") filed a complaint under Section 301 of the National Labor Relations Act, 29 U.S.C. § 185, requesting the District Court to compel tri-partite arbitration of two sets of grievances brought against it by the International Union of Operating Engineers, Local 139 ("Operator") and the Wisconsin Laborers District Council ("Laborers"). The Operators filed a counterclaim asking the district court to compel bi-partite arbitration with Miron. The Laborers, in support of Miron's motion for tri-partite arbitration, filed a motion to intervene in the Operators' counterclaim and to dismiss it for want of a necessary party. The district court ordered Miron and the Operators to submit to bi-partite arbitration and denied Miron's motion for tri-partite arbitration and the Laborers' motions to dismiss and to intervene in the counterclaim.[1] We affirm.

I. Background

Miron is a general construction contractor and a member of a multi-employer bargaining association, the Wisconsin Chapter Associated General Contractors, Inc., which negotiates collective bargaining agreements with a variety of construction trade unions on behalf of the member employers. By virtue of its membership in this organization, Miron was signatory to a collective bargaining agreement with the Operators ("Area II Agreement"), which granted the Operators the exclusive right to operate forklift trucks in construction jobsites in most of

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[1]The denial of the Laborers' petition to intervene and of its motion to dismiss the Operators' counterclaim for want of a necessary party provided the basis of appeal No. 94-1646, which was consolidated with No. 94-1546 for purposes of this decision. However, the Laborers completely failed to brief these issues on appeal, instead limiting its argument to the scope of Miron's appeal. Apparently, it believes that resolution of Miron's appeal will resolve its own appeal as well. Therefore, we need not consider this second subject of appeal. See *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225, 230 (7th Cir. 1992), *cert. denied*, 114 S. Ct. 1641 (1994).

Wisconsin.[2] Miron agreed to subcontract all work covered by the terms of the Area II Agreement to signatories to the Agreement.[3] Should any unresolvable grievances, disputes or complaints arise under the terms of the Agreement, Miron and the Operators agreed to submit all such disputes to final and binding bi-partite arbitration.[4] The Agreement excepted no dispute from this mandatory bi-partite arbitration procedure.[5]

Miron had bound itself it a similar collective bargaining agreement with the Laborers ("Laborers Collective Bargaining Agreement"), which covers the operation of mason-tending forklifts.[6] Like the Area II Agreement, the Laborers' Agreement requires all work covered under the Laborers' Agreement requires all work covered under the Agreement to be

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[2]According to section 7.8 of the Area II Agreement:
The operation of elevator or forklift trucks on construction jobsites (excluding warehouse and storage yards as per Teamster Operating Engineers International Agreement) is exclusively the craft work of the Operating Engineers, and assignment of said operation shall be made to an Operating Engineer, dispatched and covered by the terms and conditions of this Agreement.

[3]Section 4.1 of the Area II Agreement provided, in pertinent part:
The Contractor agrees that, when subletting or contracting out work covered by this Agreement...he will sublet or contract out such work only to a subcontractor who has signed, or is otherwise bound by, a written labor agreement entered into with the Union.

[4]Section 8.2 of the Area II Agreement provided, in pertinent part: "All grievances, disputes or complaints of violations of any provisions of this Agreement shall be submitted to final and binding arbitration by an arbitrator from the Federal Mediation and Conciliation Service."

[5]Prior to 1987, the Area II Agreement mandated tri-partite arbitration for jurisdictional disputes. This exception was removed under the 1987 Amendments to the Agreement and was not reintroduced when the Agreement was again amended in 1990.

[6]See Exhibit A, Jurisdictional Claims, of the Laborers' Collective Bargaining Agreement.

subcontracted to a signatory to the Agreement.[7] Although it is obvious that the Laborers' Collective Bargaining Agreement conflicts with the Area II Agreement over the assignment of mason-tending forklift work, this conflict, unfortunately, is neither uncommon in the industry, nor unknown to this court.[8]

In December, 1991, Miron was awarded the contract to construct an addition to the American Club in Kohler, Wisconsin. Miron subcontracted the masonry work to Bill Dentinger, Inc. Dentinger was a signatory to the Laborers' Collective Bargaining Agreement, but, according to the Operators, was not a signatory to the Area II Agreement.[9] Pursuant to its contract with the Laborers, Dentinger assigned members of that union to man a masonry forklift used to supply the bricklayer employees with material.

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[7]Section 9.10.1 of the Laborers' Collective Bargaining Agreement provided that:

> It is agreed that any work sublet and to be done at the site of the construction alteration, painting or repair of a building, structure, or other work, and when a portion of said work to be sublet is under jurisdiction of this Agreement, the work shall be sublet to a subcontractor signatory to this Agreement.

[8]We have encountered the dispute between the Laborers and the Operators over the assignment of forklift work on a number of occasions. See *International Union of Operating Engineers Local 103 v. Indiana Construction Corp.*, 13 F.3d 253 (7th Cir. 1994); *Alberici-Eby v. Local 520, International Union of Operating Engineers*, 992 F.2d 727 (7th Cir. 1993); *International Union of Operating Engineers Local 103 v. Indiana Construction Corp.*, 910 F.2d 450 (7th Cir. 1990); *Hutter Construction Co. v. International Union of Operating Engineers, Local 139*, 862 F.2d 641 (7th Cir. 1988); *International Union of Operating Engineers Local 150 v. NLRB*, 755 F.2d 78 (7th Cir. 1985).

[9]There appears to be some dispute as to whether Dentinger is a signatory to the Area II Agreement. This dispute is not relevant to the question of whether bi-partite arbitration is appropriate. Rather, it is precisely the type of issue which can be resolved before the arbitrator.

Claiming mason-tending forklift work was covered under the Area II Agreement, the Operators filed a grievance on March 19, 1992 seeking pay in lieu of work for violation of the union signatory subcontracting clause and requested bi-partite arbitration of the dispute. The Laborers filed a similar grievance under its Agreement to determine the work was properly assigned to its workers and for pay in lieu of work in the event it was reassigned. Miron refused to submit its dispute with the Operators to bi-partite arbitration on the ground that the dispute was jurisdictional in nature. On June 4, 1992, Miron filed a complaint seeking tri-partite arbitration among al three parties.

In the meantime, the Laborers threatened to strike if the work was reassigned. On June 12, 1992, Miron filed a § 8(b)(4)(ii)(D) unfair labor practice charge against the Laborers with the National Labor Relations Board ("NLRB").[10] These two actions formed the necessary predicate for Miron and the Laborers to petition the NLRB for a § 10(k) hearing.[11] The NLRB was a § 10(k) hearing on August 18, 1992 and awarded

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[10]Under § 8(b)(4)(ii)(D) of the National Labor Relations Act, labor organizations are prohibited from threatening to strike in order to force an employer to assign work to members of one union rather than members of another union.

[11]A § 10(k) proceeding is a hearing conducted by the NLRB subsequent to a § 8(b)(4)(D) claim to determine which union has the superior claim to "work in dispute". Before the NLRB may proceed with a determination of the dispute, it must be satisfied that there is reasonable cause to believe that § 8(b)(4)(D) has been violated and work is actually "in dispute" and that the parties have not agreed on a method for a voluntary adjustment of the dispute.

the work at the Kohler jobsite to the Laborers.[12] *Wisconsin Laborers District Council*, 309 NLRB 756 (1992).

During this same summer, the aforementioned set of events repeated themselves at a different jobsite. Miron was awarded the contract to construct the Kettle Moraine Correctional Institute in Sheboygan County, Wisconsin. Miron subcontracted the masonry work to Par Construction Company. Par was not a signatory to the Area II Agreement and employed members of the Laborers to operate the mason-tending forklifts. The Operators again filed a grievance seeking pay in lieu of work. The Laborers promptly responded with its own grievance. Miron again refused to submit to bi-partite arbitration with the Operators and, on January 19, 1993, amended its complaint filed in the district court on June 4, 1992 to include the two new grievances. Miron also filed for an NLRB determination of this second dispute and the parties are still awaiting the Board's ruling. In February, 1994, the district court granted summary judgement in favor of the Operators on its counterclaim and against Miron's complaint and ordered Miron to submit to bi-partite arbitration with the Operators. The district court also denied the Laborers' motion to intervene and motion to dismiss the Operators' counterclaim for want of a necessary party because it failed to show how it would be prejudiced by such arbitration.

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[12]According to the Board, several factors are relevant to the NLRB's determination of the dispute, including the collective bargaining agreements, company preference and practice, area practice, relative skills, and economy and efficiency of operations. See *Wisconsin Laborers District Council*, 309 NLRB 756 (1992). "The Board has held that its determination in a jurisdictional dispute is an act of judgement based on common sense and experience, reached by balancing the factors involved in a particular case." *Machinists Lodge 1743 (J.A. Jones Construction Co.)*, 135 NLRB 1402 (1962).

II. Analysis

Relying primarily on common law and policy justifications from other circuits. Miron and the Laborers argue on appeal that the jurisdictional nature of their dispute with the Operators authorizes this court to order the parties to submit to tri-partite arbitration. Alternatively, they contend that the Operators' demand for bi-partite arbitration for a violation of the subcontracting clause should be dismissed because it is in direct conflict with the NLRB's award of the work to the Laborers. Finally, to the extent that this circuit's precedent to the contrary on both of these arguments applies and cannot be distinguished, Miron and the Laborers invite the court to overrule such precedent.

We review the district court's grant of summary judgement *de novo. Colip v. Clare,* 26 F.3d 712, 714 (7th Cir. 1994); *International Union of Operating Engineers, Local 103 v. Indiana Construction Corp.*, 910 F.2d 450, 452 (7th Cir. 1990). All facts and reasonable inferences to be drawn therefrom are viewed in the light favorable to the non-movant party. *International Union of Operating Engineers v. Associated General Contractors,* 845 F.2d 704, 705 (7th Cir. 1988). The Operators will prevail only if there is no genuine issue of material fact and it is entitled to judgement as a matter of law. *Indiana Construction,* 910 F.2d at 452; Fed.R.Civ. P. 56(c).

A.

All parties to this case have offered to submit to some form of arbitration to resolve their respective disputes. However, this court will not rely on that general willingness to arbitrate as authority for ordering the three parties to come together and arbitrate any dispute which has arisen. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 648 (1986) (quoting *Steelworkers v. Warrior Gulf*

Navigation Co., 363 U.S. 574, 582 (1960)). The contract determines which disputes will be arbitrated as well as the method of arbitration. We show "strong deference to the grievance procedures established by the parties to collective bargaining agreement." *Laborers International Union, Local 309 v. W.W. Bennett Construction Co.*, 686 F.2d 1267, 1271 (7th Cir. 1982). Finally, "[t]he duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." *AT & T Technologies, Inc.*, 475 U.S. at 649 (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964)). Our task, therefore, is to examine the Area II Agreement and determine whether the dispute between Miron and the Operators is subject to bi-partite arbitration, or whether the jurisdictional character of the underlying dispute requires Miron and the Operators to join with the Laborers and submit to tri-partite arbitration.

While many collective bargaining agreements do exclude jurisdictional disputes from the normal arbitration procedures,[13] the Area II Agreement in the case at bar required bi-partite arbitration for all disputes between Miron and the Operators. Unlike past versions of the Agreement, there was no requirement that the two parties submit jurisdictional disputes to tri-partite arbitration. Thus, the collective bargaining agreement provides no authority for us to order tri-partite arbitration among the parties.

Miron and the Laborers insist that we should follow the examples of other cases which have considered tri-partite arbitration. However, these cases are distinguished by the ability of the parties to point to a contractual mechanism

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[13]The collective bargaining agreements in *Alberici-Eby*, 992 F.2d at 729; *Indiana Construction Co.*, 910 F.2d at 451; *Hutter Construction*, 862 F.2d at 642; and *Operating Engineers, Local 150*, 755 F.2d at 79 all expressly excluded jurisdictional disputes from the bi-partite arbitration procedure.

authorizing tri-partite arbitration. *See, e.g., Alberici-Eby*, 992 F.2d at 730; *Local 416, Sheet Metal Workers International Association v. Helgesteel Corp.*, 507 F.2d 1053, 1056-57 (7th Cir. 1974); *Local 513, International Union of Operating Engineers v. J.S. Alberici Construction Co.*, 936 F.2d 390, 391 (8th Cir. 1991) (in each case, the union had bound itself in the collective bargaining agreement to submit jurisdictional disputes to the multi-party arbitration procedure adopted by the AFL-CIO.) Although some courts have considered tri-partite arbitration without a contractual mechanism, these cases have been carefully limited to classic one-on-one jurisdictional disputes where each union explicitly claims the work is covered under the terms of its agreement. The only claimed violation of each union's respective collective bargaining agreement was the work jurisdiction provision. See *United States Postal Service v. National Rural Letter Carriers' Association*, 959 F.2d 283, 286 (D.C. Cir. 1992); *Retail, Wholesale and Department Store Union, Local 390 v. Kroger Company*, 927 F.2d 275, 277 (6th Cir. 1991); *United States Postal Service v. American Postal Workers Union*, 893 F.2d 1117, 1120 (9th Cir., 1990); *Local No. 850, International Association of Machists & Aerospace Workers v. T.I.M.E.-DC, Inc.*, 705 F.2d 1275, 1277-78 (10th Cir. 1983); *W.W. Bennett Construction Co.*, 686 F.2d at 1274; *Columbia Broadcasting System, Inc. v. American Recording & Broadcasting Association*, 414 F.2d 1326, 1328-29 (2d Cir. 1969); *International Union of Operating Engineers v. Allied Construction Employers*, No. 81-C-864, slip op. at 3 (E.D. Wis. April 18, 1983). Such disputes are thus identical to § 10(k) proceedings before the NLRB except that neither party has engaged in a strike nor threatened to strike to force the employer to reassign the job. Each union has employed the grievance mechanisms in its collective bargaining agreements. Tri-partite arbitration, therefore, may be appropriate since we would not want to force unions to engage in coercive behavior in order to get the multi-party forum that a § 10(k) hearing provides to resolve the work assignment issue. National Labor policy strongly favors the voluntary private arbitration of disputes

where possible. *International Union of Operating Engineers Local 150,* 755 F.2d at 86.

However, no case has ordered the parties to submit to tri-partite arbitration to resolve two distinct contractual grievances arising from the same set of facts. The instant case thus lacks the "requisite contractual nexus" to order tri-partite arbitration since the parties have not agreed to arbitrate the merits of the same dispute. *National Rural Letter Carriers' Association*, 959 F.2d at 287. Miron and the Laborers agreed to arbitrate the question of who should be assigned the work, while the Operators agreed to arbitrate the subcontracting clause dispute.

Furthermore, our decision in *Hutter Construction Co. v. International Union of Operating Engineers, Local 139*, 862 F.2d 641, 645 (7th Cir. 1988), forecloses any possibility that the subcontracting dispute and the jurisdictional dispute could be classified as the same contractual grievance. Not only are the facts in *Hutter* almost identical to the case at bar, but the parties are almost identical as well. Hutter Construction Company ("Hutter") was a signatory to the Area II Agreement with the Operators. Hutter subcontracted certain masonry work to Bill Dentinger, Inc., who, as in this case, was a signatory to the Laborers' Collective Bargaining Agreement, but not to the Area II Agreement. The Operators filed a grievance against Hutter for violating the subcontracting clause. Unlike Miron, Hutter did submit to bi-partite arbitration. The arbitrator ruled the dispute was contractual and ordered Hutter to provide backpay to the Operators in lieu of work. The Laborers staged a work stoppage and was awarded the forklift work on jurisdictional grounds at the resulting § 10(k) NLRB proceeding. In the meantime, Hutter refused to comply with the arbitrator's award and brought an action to have the award vacated on the ground that the dispute was jurisdictional, and thus subject to tri-partite rather than bi-partite arbitration. At the time, the Area II Agreement called for tri-partite arbitration in resolving jurisdictional disputes. We held that the contractual dispute could be separated from the jurisdictional dispute. Two

considerations prompted this result: First, since the breach arose immediately upon subcontracting to a non-signatory, it was irrelevant which union eventually was assigned the work; Second, characterizing the dispute as jurisdictional would unfairly avoid the agreed upon penalty for breach of the subcontracting clause. *Id.* at 644-45. The fact that Hutter would thus be obligated to pay two unions for the identical job was admittedly harsh, but one "solely attributable to Hutter's decision to enter into conflicting bargaining agreements." *Id.* at 645 n.16.

Miron and the Laborers urge us to overrule *Hutter* and adopt the reasoning of the Eighth Circuit in *Local 513, International Union of Operating Engineers v. J.S. Alberici Construction Co.*, 936 F.2d 390, 391 (8th Cir. 1991), where the jurisdictional and subcontracting disputes were found "so intertwined as to be one conflict." *Id.* at 392. We decline to do this. In *Alberici*, the subcontracting dispute was nothing more than a cover for the jurisdictional dispute. The court emphasized that "six other non-signatory subcontractors have performed work on the project without objection by Local 513." *Id.* Moreover, the court found that Local 513's initial complaints made to Alberici were confined exclusively to the work assignment issue. Only after those complaints "proved unavailing," did the union invoke the subcontracting clause. *Id.* at 390-391. By contrast, in the instant case, the Operators have consistently enforced the subcontracting clause in the Area II Agreement, and the union raised the issue of the clause's violation in its first grievance filed with Miron.

Thus, we conclude that the district court's decision to order Miron and the Operators to submit to bi-partite arbitration was well-grounded in the terms of the Area II Agreement. The subcontracting dispute between Miron and the Operators is separable from any jurisdictional dispute which might exist between the Operators and the Laborers.

B.

Miron and the Laborers contend that even if bi-partite arbitration is proper under the Area II Agreement, the NLRB's decision to award the American Club work to the Laborers in the § 10(k) hearing precludes the Operators from filing a grievance under the subcontracting clause. This assumes that the arbitrator's award will be inconsistent with the NLRB decision. When an arbitration award is in conflict with the decision of the NLRB in a § 10(k) proceeding, the NLRB decision takes precedence. *Carey v. Westinghouse Electric Corp.*,375 U.S. 261, 272 (1964); *Hutter*, 862 F.2d at 645.

This court in *Hutter* held that an arbitrator's award of backpay to one union is not inconsistent with the NLRB's decision to award the work to a different union. *Id.*, 862 F.2d at 645. Miron and the Laborers attempt to distinguish this decision on procedural grounds. In *Hutter*, the arbitrator's award preceded the § 10(k) hearing whereas here the NLRB decision has come first. It is not clear why this distinction should alter our conclusion. The Laborers offer two possibilities which are easily dismissed. The first suggested distinction is that the NLRB determined that the Operators' grievance over the subcontracting clause was not meritorious and was really a claim for work. This, they suggest, should serve to bar any further adjudication of the grievance. However, the NLRB made no such factual finding. The Board relied solely on *Laborers Local 731 (Slattery Assoc.)*, 298 NLRB No. 111, 1990 NLRB LEXIS 615 (1990) for its legal conclusion that a grievance seeking payment in lieu of work is sufficient to constitute a "claim for work" and place the dispute within the NLRB's jurisdiction. *Wisconsin Laborers' District Council*, 309 NLRB 756 (1992).[14] This standard is designed to meet the Board's decidedly low threshold requirement that it find reasonable clause to believe that § 8(b)(4)(D) has been violated. See *Slattery Assoc.*, 1990

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[14]The Laborers rely on the § 10(k) hearing's concurrence for its allegation that the NLRB made a finding that the Operators' claim was not arguably meritorious. Such reliance is obviously misplaced.

NLRB LEXIS 615, at *9-10. Thus, even the factual underpinnings of this legal conclusion do not bind us in this proceeding. The second suggested distinction offered by the Laborers is that *Hutter* merely stands for the proposition that the arbitrator's award went unopposed for ninety days and therefore had to be upheld by the court as a matter of law. This is a bold mischaracterization considering that *Hutter* never once mentioned any mandatory period within which to oppose the arbitrator's award. *Hutter's* two main holdings, that the subcontracting grievance was separable from the jurisdictional claim, and that the arbitrator's and NLRB's awards did not conflict, are the only rationales offered. *Id.*, 862 F.2d at 644-45. We therefore find neither of these proposed distinctions persuasive. Regardless of the order of the proceedings, the arbitrator will continue to consider only the legitimacy of the Operator's contractual claim, while the NLRB will consider the legitimacy of each parties' overall claims to the work, including a variety of contractual and non-contractual factors. See *Hutter*, 862 F.2d at 645. Thus, *Hutter's* determination that an arbitrator's award of backpay to one union does not conflict with the award of work to another union in the § 10(k) proceeding is not distinguishable.

In the alternative, Miron and the Laborers invite us to overrule or harmonize *Hutter* with other cases. Their argument is that only the union who has the superior claim to the work is entitled to compensation. Since the Laborers were awarded the work, an arbitrator's decision to award pay in lieu of the work to another union would effectively undermine the § 10(k) decision. They ask us to adopt the reasoning of the Third Circuit in *Local 30, United Slate, Tile & Composition Roofers v. NLRB*, 1 F.3d 1419 (3d Cir. 1993), where continued maintenance of a suit to enforce an arbitration award contrary to a § 10(k) result was held to be an unfair labor practice. *Id.* at 1428. We decline this invitation for two reasons.

First, the NLRB itself agrees that its decision to award work to one union does not preclude the losing union from pursuing

its contractual remedies against the general contractor.[15] See *Local Union 33 (Blount Brothers)*, 289 NLRB 1482 (1988). The Board in *Slatter Assoc.*, 298 NLRB No. 111, 1990 NLRB LEXIS 615 (1990), emphasized this point when it ruled that a subcontracting grievance constituted a demand for work for purposes of determining NLRB jurisdiction:

> *Blount* makes it clear that a 10(k) award does not block a union's access to its contractual remedies for breach of a union signatory subcontracting clause. Subsequent to the instant 10(k) proceeding, Iron Workers is free to continue to seek redress under its contract with Ambridge for alleged breach of contract, if Iron Workers limits its conduct to pursuing its grievance against Ambridge. Under *Blount*, such conduct is not coercive, and any charge filed with the Board concerning that conduct will be dismissed.

Slattery Assoc., 1990 NLRB LEXIS 615 at *10-11. The right to pursue contractual remedies also includes the right to ask for monetary damages, including pay in lieu of work. *Blount Brothers*, 289 NLRB 1482 (1988).[16] This comports with the

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[15] In fact, the NLRB summarily dismissed charges that the Operators were engaging in an unfair labor practice by maintaining its grievance after the § 10(k) award. See letter from Joseph A. Szabo, Regional Director, NLRB re cases 30-CC-521 and 30-D-154 dated December 15, 1993. (Operators' supplemental appendix at A-21.) An appeal of this decision is pending. See letter from Yvonne T. Dixon, Director, Office of Appeals, NLRB re cases 30-CC-521 and 30-CD-154 dated June 16, 1994. (Laborers' supplemental appendix at A-1.)

[16] *Iron Workers Local 433 (Swinerton & Walberg Co.)*, 308 NLRB No. 105, 1992 NLRB Lexis 1060 (1992), contrary to the Laborers' assertions, supports the Board's position that the losing union in a § 10(k) proceeding may pursue a subcontracting clause grievance against the general contractor. In *Swinerton & Walberg*, the Board found that Local 433 alleged no violation of the subcontracting clause in its grievance. Furthermore, its petition to compel arbitration did not mention the subcontracting clause. Id., 1992 NLRB Lexis 1060 at *3-4. According to the district court, "[Local] 433 contorts the history

fundamental purpose underlying a § 10(k) proceeding. In 1947, Congress responded to the labor unrest caused by jurisdictional strikes by establishing the § 10(k) proceeding to provide a quick and final resolution of who was entitled to perform the work. *International Tel. & Tel. Corp. v. Local 134, International Brotherhood of Electrical Workers*, 419 U.S. 428, 430 (1975). These provisions were specifically designed "to protect employers from being 'the helpless victims of quarrels that do not concern them at all'". *NLRB v. Radio & Television Broadcast Engineers Union, Local 1212*, 364 U.S. 573, 580-581 (1961). However, a § 10(k) award is not designed to serve as "a safe haven for those who breach union signatory subcontracting clauses." *Slattery Assoc*, 1990 NLRB LEXIS 615 at *11. A breach of the subcontracting clause results in a dispute between the general contractor and one union only. The identity of the employees who ultimately perform the work is irrelevant to the union's cause of action. See *Hutter*, 862 F.2d at 644. As such, it does not fit the classic model of a jurisdictional dispute "between two or more groups of employees over which is entitled to do certain work." *Radio Engineers*, 364 U.S. at 579. Moreover, it is a dispute which a general contractor is not "helpless" to prevent. Therefore, it is entirely consistent with the purposes and practices of the NLRB to allow the losing union in a § 10(k) hearing to pursue its contractual remedies against the general contractor.

Second, a union's mere pursuit of its contractual remedies against the general contractor, absent a demand that the subcontractor reassign the work, does not amount to coercion in contravention of the § 10(k) award. Since the subcontractor has

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of this case in its attempt to transform it into a subcontracting clause dispute." *Id.*, 1992 NLRB LEXIS 1060 at *4 n.2. The Board found that "S&W, the general contractor, assigns the disputed work and is the employer against whom Iron Workers Local 433 filed a grievance." Id., 1992 NLRB Lexis 1060 at 4. Thus, the Board properly held that the maintenance of an action to compel arbitration was in contravention of its § 10(k) award. It cited *Blount Brothers* with approval, but found it inapplicable on these facts.

complete control over which union actually performs the work, maintenance of an action against the general contractor cannot be viewed as a veiled attempt to force a reassignment of the work. The element of coercion is what distinguishes the instant case from *Local 30, United Slate, Tile & Composition Roofers v. NLRB*, 1 F.3d 1419 (3d Cir. 1993). In *Local 30*, there was no subcontractor. The employer, Gundle Construction, was responsible both for the work assignment and for the breach of certain terms of the union's collective bargaining agreement. Thus, any action taken against Gundle, even for an unrelated breach of contract, could be interpreted as an attempt to coerce Gundle to reassign the work in contravention of the § 10(k) award. The NLRB ruling, upheld by the court in *Local 30*, thus distinguished this case from the dispute over a violation of the subcontracting clause in *Blount*. See *Local 30 (Gundle Lining Construction Corp.)*, 307 NLRB 1429, 1992 NLRB LEXIS 900 (1992), *enforced*, 1 F.3d 1419 (3d Cir. 1993). In *Blount Brothers*, the general contractor against whom the action was brought had no responsibility for the assignment of the work, whereas "Gundle itself is the employer of the employees to whom the work was awarded. The court action is therefore a collateral attack on the award itself." *Gundle Lining Construction Corp.*, 1992 NLRB LEXIS 900 at *6 n.4.

This distinction between an arbitration award against a general contractor and an arbitration award against the employer responsible for work assignment was recognized by the First Circuit in *J.F. White Contracting Co. v. Local 103 International Brotherhood of Electrical Workers*, 890 F.2d 528, 530 (1st Cir. 1989). Circuit Judge (now Justice) Breyer, writing for the court, agreed that *Hutter's* finding of no conflict made sense on its facts: "We can understand how a court might have found no significant conflict on these facts, for the company could obey the arbitrators' award without interfering with the subcontractor's duty to assign forklifting work to the Laborers." *J.F. White Contracting Co.*, 890 F.2d at 530. However, in the case before them, a conflict did exist since the employer was subject to completely conflicting awards. *Id.*, 890 F.2d at 529.

Thus, we conclude that the § 10(k) award does not preclude the Operators from pursuing its subcontracting clause grievance in bi-partite arbitration. An arbitrator's award of backpay to one union in a subcontracting dispute is not inconsistent with the NLRB's prior award of the work to a different union in a § 10(k) proceeding. *Hutter* controls this case despite the difference in the sequence of the collateral proceedings. The NLRB itself recognizes that the losing party in a § 10(k) award may continue to pursue its contractual remedies against the general contractor. This is not coercive behavior in contravention of the § 10(k) award because it is aimed at Miron rather than the subcontractor who is ultimately responsible for assigning the work. Since the Operators only seek relief under the subcontracting clause, Miron is not incapable of complying with the orders of both proceedings.

III.

For all of the reasons given above, we AFFIRM the district court's decision ordering Miron and the Operators to submit to bi-partite arbitration to resolve the Operators' grievance.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

MIRON CONSTRUCTION CO., INC.,
Plaintiff/
Counterdefendant,

v. Civil Action No. 92-C-589

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139
Defendant/Counterplaintiff,

and

WISCONSIN LABORERS DISTRICT COUNCIL,
Defendant

DECISION and ORDER

In this action, plaintiff Miron Construction Co., Inc., ("Miron"), has sued to compel tri-partite arbitration of two sets of grievances brought against its by defendant/counterplaintiff International Union of Operating Engineers, Local 139 ("Local 139") and defendant Wisconsin Laborers District Council ("Laborers Council"). Local 139 has counterclaimed seeking an order compelling tri-partite arbitration. The Laborers Council has moved to intervene in that counterclaim and also to dismiss the counterclaim for failure to join a necessary party. The Laborers Council opposes bi-partite arbitration and supports Miron's claim for tri-partite arbitration.

Both Miron and Local 139 have filed summary judgement motions on their claims.[1] In this case, all of the parties agree that there is no dispute of material fact, and thus the court will enter judgement as a matter of law. Fed. R. Civ. P. 56(c).

For the reasons set forth below, this court will order that Miron and Local 139 submit to bi-partite arbitration and will deny Miron's motion for tri-partite arbitration and the Laborers Council's motions to dismiss and to intervene in the counterclaim.

FACTUAL BACKGROUND

Miron is a general contractor and a signatory to collective bargaining agreements with both the Laborers Council and Local 139.[2] Both the Local 139 Agreement and the Laborers Council Agreement have broad arbitration clauses mandating final and binding arbitration between the contractor and the union for unresolvable grievances arising under the Agreements. (Local 139 Agreement, Art. VIII; Laborers Council Agreement, Art. III.)

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[1]Local 139 actually moved for a judgement on the pleadings pursuant to Fed. R. Civ. P. Rule 12. Under that rule, if "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgement and disposed of as provided in Rule 56." Rule 12(b). Because the court considers Local 139's motion in light of later submissions, it will treat both motions as ones for summary judgment.

[2]The agreement embodying the collective bargaining relationship between Miron and Local 139 for the location relevant to this case is known as the Area II Building and Heavy Construction Master Agreement ("Local 139 Agreement"). The 1990-1993 Local 139 Agreement is attached to Local 139's Answers as Exhibit "A".

The Agreement between Miron and the Council is entitled the Laborers' Collective Bargaining Agreement ("Council Agreement"). The 1990-1993 Council Agreement is attached to the Council's 7/16/93 Submission of Additional Material as Exhibit 1.

Operating a forklift is Local 139 bargaining unit work under the Local 139 Agreement.[3] Further, Miron may only subcontract work covered by the Agreement to a "subcontractor who has signed, or is otherwise bound by, a written labor agreement entered into with the Union." (Local 139 Agreement, Art. IV, § 4.1)[4] The work of the Laborers Council includes the conveying of materials by forklift. (Laborers Council Agreement, Ex. A, Jurisdictional Claims.)

Miron was the general contractor for two jobsites at issue in this case -- one at the American Club located in Kohler, Wisconsin and the other at the Kettle Moraine Correctional Institute located in Sheboygan County, Wisconsin. At both sites, Miron had subcontracted work to masonry contractors (the "Subcontractors") who were signatories to the Laborers Council contract but allegedly not to the Local 139 Agreement.[5] The Subcontractors used mason-tending forklift trucks. Each of the unions claims that the operation of the forklift is covered by their bargaining agreement.

When it discovered that Miron had subcontracted to non-signatory contractors, Local 139 filed two separate grievances for breach of the Local 139 subcontracting provision. (Attached

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[3]Under Section 7.8 of the Local 139 Agreement:

The operation of elevator or forklift trucks on construction jobsites...is exclusively the craft work of the Operating Engineers and assignment of said operation shall be made to an Operating Engineer dispatched and covered by the terms and conditions of this Agreement.

See also Local 139 Agreement, Art. VI (Jurisdiction), SS 6.1 (Equipment Assignment).

[4]Section 9 of the Laborers Council Agreement has a similar provision.

[5]There is some dispute as to whether one of the Subcontractors had a viable labor agreement with Local 139, but that dispute is not material to the issue before this court.

to 1/19/93 First Amended Compl. as Exs. A & A2.) It subsequently filed a request with the Federal Mediation and Conciliation Service ("FMCS") to arbitrate the two grievances, but Miron refused to arbitrate. Miron took the position that the disputes underlying the grievances were jurisdictional in nature, rather than contractual.

The Laborers Council then filed two grievances of its own against Miron seeking declarations that the subcontracting assignments at the Kohler and Sheboygan County jobsites were properly made to the Laborers Council. (Attached to 1/19/93 First Amended Compl. at Ex. B & B2.) The Laborers Council has agreed to submit its grievances to the FMCS along with the Local 139 grievance. Id.

Miron and the Laborers Council successfully petitioned the National Labor Relations Board ("NLRB") to conduct separate hearings regarding what both of them contended was jurisdictional "work in dispute" on the two jobsites. The NLRB awarded the "work in dispute" at the Kohler jobsite to the Laborers Council. 309 NLRB No. 116 (Dec. 8, 1992). The Kettle Moraine dispute awaits NLRB ruling in Case No. 30-CD-147.[6]

Miron also responded to the grievances by filing a complaint in this court, seeking to compel tri-partite arbitration among Local 139, the Laborers Council and itself. Local 139 counterclaimed, seeking to compel bi-partite arbitration of the contractual grievance between Miron and itself, and to exclude the Laborers Council. Local 139's position was and is that the allegations of breach of the subcontracting clause in the Local 139 Agreement may not be referred to tri-partite arbitration under the contract, and that the jurisdictional issue of who the

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[6]Local 139 did not participate in the proceedings regarding the Kohler jobsite, but has participated in the Sheboygan County jobsite proceedings.

work belonged to is separable from the issue of the breach of the subcontracting clause.

ANALYSIS

There is no doubt that the dispute in this case is subject to some form of arbitration. The court's role then, it to look at the collective bargaining agreement and all of the relevant evidence to determine whether the dispute between Miron and Local 139 is subject to bi-partite arbitration or tri-partite arbitration, which would include the Laborers Council. See Int'l Union of Operating Engineers v. Indiana Construction Corp., 910 F.2d 450, 452 (7th Cir. 1990).

The law which controls a case such as this in the Seventh Circuit is found in Hutter Construction Co. v. Int'l Union of Operating Engineers Local 139, 862 F.2d 641 (7th Cir. 1988). The facts of Hutter are nearly identical to those presented here, save for the chronology of certain collateral litigation.[7] Hutter Construction Company ("Hutter") was party to the Area II Agreement then in place with Local 139. Like Miron, Hutter subcontracted certain masonry work to a subcontractor who had signed the Laborers Council contract but not the Local 139 Agreement. The Laborers Council operated the forklift trucks on the jobsite, which motivated Local 139 to file a grievance against Hutter for subcontracting to a subcontractor who had not signed to Local 139 Agreement.

In Hutter, bi-partite arbitration came first, and the arbitrator found that the dispute between Local 139 and Hutter was not jurisdictional, but contractual in nature. It ordered Hutter to pay backpay to Local 139 members who had been precluded from working as a result of Hutter's violative subcontract. Hutter did not comply, the Laborers Council staged a work stoppage, and a

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[7] In fact, two of the three parties in this case were parties to the Hutter case, and one of the non-signatory Subcontractors here occupied the same position in Hutter.

Section 10(k) proceeding resulted at the NLRB. The NLRB awarded the forklift work to the Laborers Council on jurisdictional considerations of subcontractor preference and efficiency of operations. Hutter moved to vacate the arbitration decision in this court, which denied the motion and ordered the arbitration award enforced. Hutter appealed, arguing that the Local 139 grievance was really a jurisdictional dispute and that the arbitrator had erred in ruling to the contrary. Further, Hutter stated that the NLRB decision resolved the issue and took precedence over an arbitration award. Finally, Hutter argued that the subcontracting grievance should have been heard in tri-partite arbitration of jurisdictional disputes. That provision does not exist in the Local 139 Agreement which applies between Miron and Local 139 in this case. In ruling de novo on the arbitratility of a dispute, the court of appeals affirmed this court's decision, and rejected each of Hutter's arguments. Hutter, 862 F.2d 641. Much of what it found directs the result in the instant case.

First, the Circuit ruled that Local 139's subcontracting grievance constituted a breach of contract claim independent of any work assignment/jurisdictional disputes. Id. at 644-655. Just as in Hutter, any subcontracting grievance between Local 139 and Miron would be separable from any jurisdictional dispute between Local 139 and the Laborers Council. To say otherwise, would create an unfair outcome under the terms of the subcontracting provision of the Local 139 Agreement, which provides a remedy against contractors who breach by subcontracting with non-signatories. See Id. at 644. In this case, the broad arbitration clause of the Local 139 Agreement clearly calls for arbitration to resolve the dispute.[8]

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[8]It is true, as the Laborers Council has pointed out, that the Third Circuit has found that "[t]he distinction...between seeking the work and seeking payment for the work is ephemeral...'[T]he fact that both groups are claiming pay for the same work suffices to create a jurisdictional dispute.'" Local 30, United Slate, Tile & Comp. Roofers v. NLRB, 1 F.3d 1419, 1427-28 (3rd Cir. 1993) (quoting NLRB v. Local 1291, Int'l Longshoremen's

Second, the Hutter court found that NLRB jurisdictional rulings awarding work to one union do not conflict with arbitration contractual rulings awarding backpay to a second union. Id. at 645-46. The NLRB has broad statutory powers to resolve jurisdictional disputes in a single proceeding. Laborers' Int'l Union v. W.W. Bennett Construction, 686 F.2d 1267 (7th Cir. 1982); National Labor Relations Act, § 10(k), as amended 29 U.S.C.A. § 160(k). It has done so with the Kohler jobiste dispute in this case, and will do so with the Kettle Moraine dispute. If the NLRB and the arbitrator's decisions clash, then the Board's ruling takes precedence and an arbitrator's award of work will not be enforced.[9] Id. at 1277; Carey v. Westinghouse, 375 U.S. 261, 272 (1964). However, the Seventh Circuit has confirmed that no such clash will exist even if an arbitrator awards backpay to Local 139 for a breach of the subcontracting clause and the NLRB awards work to Laborers Council. See Hutter, 862 F.2d at 645-46.[10]

Finally, the Hutter court denied Hutter's argument that the arbitration should have been tri-partite, finding that the arbitrator had the authority to resolve the grievance through bi-partite arbitration. Id. at 645. Just as there, an arbitrator of the

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Assoc., 368 F.2d 107, 110 (3d Cir. 1966), cert. denied, 386 U.S. 1033 (1967). The Third Circuit further found that permitting a union to recover damages in a contractual dispute for work that the NLRB awarded in a jurisdictional dispute to another union undermines the purpose of authorizing the NLRB to resolve jurisdictional disputes in the first place -- that is, to protect "employers from the detrimental economic impact of jurisdictional disputes." Id. at 1428. Even if this court agreed with the Third Circuit's reasoning in Local 30, however, that case rejected the reasoning of Hutter, and Hutter is still the law in this Circuit.

[9]Until that time, however, "the law does not compel participation." Id. at 1278.

[10]Nothing in this opinion is intended or should be taken as a ruling that Miron has violated its contract with Local 139. The arbitrator must decide upon that issue.

dispute between Miron and Local 139 would have the authority to conduct bi-partite arbitration which would exclude the Laborers Council. However, that fact and the holding of the circuit court in Hutter, does not necessarily resolve the issue of whether or not tri-partite arbitration would be more appropriate in this case, given the fact that no arbitration has yet occurred.

For several reasons, however, this court will refuse to order tri-partite arbitration. First, neither the contract between Miron and Local 139 nor that between Miron and Laborers Council calls for tri-partite arbitration, even of jurisdictional disputes. Parties should only be forced to arbitrate to the extent they have agreed to do so. Bennett, 686 F.2d 1267. This court will not look beyond the collective bargaining agreement in this case when it contains an agreed-upon method of arbitration which binds the parties involved. See Id. at 1271.

Second, while Miron may end up being subject to multiple claims based upon the same work, that would be the result of its own conduct in signing agreements containing provisions leading to that outcome.

Finally, the Laborers Council is not entitled to intervene in the counterclaim for bi-partite arbitration between Local 139 and Miron because it has not shown how it would be prejudiced by such arbitration.[11] The Laborers Council has presented no evidence that bi-partite arbitration would impair its ability to protect its own agreement with Miron. Ordering bi-partite

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[11]On February 22, defendant Laborers Council moved this court to dismiss Local 139's counterclaim pursuant to Rule 19 of the Federal Rules of Civil Procedure for failure to join a necessary party (the Laborers Council). On June 16, 1993, this court ruled that Defendant Local 139's March 5, 1993 motion to strike defendant Laborers Council's motion to dismiss was denied in part. The motion was denied with respect to Local Rule 6.01 timeliness and technical arguments. This court reserved ruling on the motion with respect to the standing argument, pending receipt of Laborers Council's reply brief. That brief has now been filed. The Laborers Council's motion to dismiss and its petition to intervene will be denied.

arbitration between Miron and Local 139 does not deny the Laborers Council its rights to bi-partite arbitration. The arbitrator need only determine whether or not Miron violated its agreement with Local 139. In doing so, it need not interpret the Laborers Council Agreement. Further, as already noted, the NLRB has awarded the work at the Kohler jobsite to the Laborers Council, and a ruling on the jurisdictional claims at the Kettle Moraine site is forthcoming. Under Carey v. Westinghouse, the NLRB decisions regarding the award of work will not be set aside by an arbitration decision. 375 U.S. 261, 272 (1964). Therefore, the Laborers Council has not shown that it would suffer a loss of its right to represent its own interests if bi-partite arbitration is conducted between Miron and Local 139.

For all of the reasons stated herein:

IT IS THEREFORE ORDERED that Defendant/Counterplaintiff International Union of Operating Engineers, Local 139's motion for judgement on the pleadings/summary judgement is **GRANTED**, this case is **DISMISSED**, and Miron Construction Company and Local 139 shall proceed to arbitration on the contractual dispute.

IT IS FURTHER ORDERED that Plaintiff/Counterdefendant Miron Construction Company's motion for summary judgement is **DENIED**.

IT IS FURTHER ORDERED that Defendant Wisconsin Laborers District Council's motion to dismiss the counterclaim and petition to intervene in the counterclaim are **DENIED**.

Dated at Milwaukee, Wisconsin, this 9th day of February, 1994.

BY THE COURT

John W. Reynolds
Senior Judge